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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

DAVID RAYNOR et al.,

Plaintiffs and Appellants,

v.

CRAIG LIPTON et al.,

Defendants and Respondents.

A154651

(City & County of San Francisco
Super. Ct. No. CGC-18-564309)

Plaintiffs David Raynor and Erin Dolly appeal from an order granting in part and denying in part a preliminary injunction which they sought against defendants Craig Lipton and two entities controlled by Lipton, Maven Maintenance, Inc. and Peg Leg Productions, LLC (collectively Lipton or defendants). Plaintiffs are the owners of a three-story, two-unit home at 151 Arkansas Street in San Francisco and Lipton is a real estate developer developing the adjacent property at 153 Arkansas Street. Plaintiffs obtained a temporary restraining order preventing Lipton from proceeding with excavation on his property which had already damaged and threatened to cause additional damage to plaintiffs' property. In support of and opposition to plaintiffs' request for a preliminary injunction, the parties submitted conflicting proposals for the corrective measures that Lipton should be required to take to repair and protect plaintiffs' property before resuming work on its property. Following unsuccessful efforts of the parties to reach agreement, on May 15, 2018, the court ruled that Lipton should within 30 days complete specified repair work to plaintiffs' property and, rejecting the request to require Lipton to perform work that plaintiffs' expert deemed necessary to adequately protect plaintiffs'

home, gave plaintiffs five days to select between two alternatives proposed by Lipton, which Lipton would then be required to complete within 45 days (unless extended) before the restraining order would terminate and Lipton could resume work on his property. The two alternatives are described by drawings marked as exhibits B and C to the court's order. Plaintiffs challenge this order on procedural grounds and on the ground that the sufficiency of the alternative measures approved by the court's order is not supported by competent evidence. This court previously issued a writ of supersedeas staying implementation of the trial court order pending resolution of the appeal.

Cutting through a myriad of subsidiary issues, the dispositive issue comes down to whether the record contains substantial evidence showing that either or both of the two court-approved alternatives will adequately protect plaintiffs' property from further damage upon resumption of excavation on defendants' property. The record contains considerable conflicting evidence as to the necessity or the sufficiency of a variety of plans submitted by experts for the opposing parties. Over the course of several hearings, the trial court expended considerable time and effort attempting to induce the opposing experts to agree upon a mutually acceptable plan to protect plaintiffs' property. When those efforts proved unsuccessful, the court requested and received from plaintiffs a proposed plan marked exhibit A to the court's order and from defendants the alternative proposed plans marked exhibits B and C. These alternatives were not necessarily the same as plans that prior declarations from the conflicting experts had opined were sufficient, excessive or insufficient. None of the three proposals was marked in evidence or authenticated. Although the record contains many opinions about plans undoubtedly bearing similarities to the plans depicted in exhibits B and C, the record contains no evidence specifically addressing exhibit B or exhibit C.

Because of the uncertainty in relating the opinion of defendants' expert as to the sufficiency of previous proposals to the plans depicted in exhibits B and C, this court requested supplemental briefing from the parties as follows: "Specify precisely where in the record, if anywhere, there is competent evidence that either of the proposals attached as exhibits B and C to the court's May 15, 2018 order will safely protect plaintiffs'

property from further damage upon the resumption of excavation on defendants' property. [¶] (a) If reference is made to a declaration of Rodrigo Santos, or of any other qualified expert, opining that work specified in drawings attached to the declaration or otherwise specifically identified will safely protect plaintiffs' property, identify where in the record, if anywhere, there is competent evidence that the work described in exhibit B or exhibit C to the court's order is the same as the work specified in the expert's declaration."

The answers received from counsel indicate that the answer is "nowhere." Counsel for defendants make no effort to suggest there is any evidence in the record relating to the drawings marked exhibit C, citing only the trial court's order itself.

As to exhibit B, defendants' counsel points to portions of the March 2018 corrected declaration of defendants' expert, Rodrigo Santos. That declaration states that Santos "considered an excavation proposal whereby defendant Peg Leg Productions, LLC ('Peg Leg') would strengthen the retaining wall at the property line using rebar and epoxy, remove all but a portion of the retaining [wall] from the property and leave behind all of the retaining wall extending onto the adjacent property." The portion of the declarations referred to by counsel in answer to this court's inquiry reads, "In my professional opinion, Peg Leg's plan to continue excavating by removing . . . most of the retaining wall and onto the property and then reinforcing the wall with rebar and epoxy takes reasonable precautions to both: 1) sustain the adjacent property; and 2) protect the building on the adjacent property. [¶] . . . [¶] . . . Peg Leg may reinforce the retaining wall at the property line with epoxy and rebar, and remove most of the portion of the retaining wall on the property, without . . . causing damage to plaintiff's building." Defense counsel continues, quoting from Santos's supplemental declaration, "I propose reinforcing the wall with epoxy and rebar and then sawing off that portion extending on to 153 Arkansas Street. . . . In my professional opinion, this engineering solution will adequately protect plaintiff's property and the building from damage during the excavation and construction."

Defendants assert that these portions of Santos’s declarations “support[] the ‘Installation Notes’ contained in exhibit B.” These notes read: “Prepare the existing concrete as shown in detail D2 and install the epoxy dowels into side of the existing footing” and “Install the steel embeds and concrete beam as shown in details D2 & D3.”

From the record before us, we are unable to confirm that the plans to which Santos was referring in his March 2018 declarations are the same as depicted on exhibit B to the court’s order entered in May. Although both include the use of epoxy and rebar, Santos’s declarations make no reference to exhibit B and there is no drawing or other specification of the “Peg Leg plan” to which he did refer that would enable comparison to exhibit B. According to a declaration submitted by plaintiffs’ counsel, plaintiffs’ representatives did not receive a copy of exhibit B until two days before the May 4 hearing and the work it describes differs significantly from “the seven point construction plan we had been discussing in March.”¹ Because exhibit B was never identified or authenticated on the record, and no evidence was received or opportunity afforded to support, question or clarify the sufficiency or details of the plan,² we must conclude that the record does not contain evidence supporting the court’s implicit finding as to the sufficiency of the proposed work referenced in exhibit B.

Disposition

Because the record does not contain evidence supporting the finding on which the order appealed from rests, we reverse the order and remand the matter for further proceedings. We express no opinion as to the adequacy of defendants’ proposed plans to

¹ Moreover, in a declaration submitted in support of plaintiffs’ unsuccessful motion for reconsideration, plaintiffs’ expert asserts that exhibit B, which he first saw the day before the hearing, “incorrectly depict[s] the existing conditions of the wall and post on the [plaintiffs’] property.”

² The court’s order states that it was “presented” with the three documents attached to its order and that exhibit B was “described in court and anticipated to cost about \$14,000. The proposal includes repair of rotted studs and installation of siding, as well as painting the entire wall.” The record contains no transcript of these proceedings, which in all events appear to have consisted solely of argument by counsel without the submission of evidence.

reasonably protect plaintiffs' property, but any findings on which the court fashions its preliminary injunction should be based on competent evidence which both sides are given the opportunity to submit.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
BROWN, J.